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no grounds have been advanced to induce us to suppose that that decision is not correct. Speaking for myself I desire to say, with reference to certain observations made in the decision of this Court, and in the decision of the Allahabad Court (1), that it does not appear to me necessary, in order to arrive at the conclusion that a separate suit will lie, to limit the meaning of the words "any Court" in the last paragraph of s. 258, to any Court executing the decree. I think that if this had been the intention of the Legislature, the expression "the Court" would probably have been used for "any Court." It is quite possible to suppose cases, other than those concerned with the satisfaction of the decree by a money payment, or other form of satisfaction, in which the question whether the decree had been satisfied might involve questions relating to title or other matters either as between parties to the suit, or as between other parties, and it may be quite possible (it is unnecessary to decide the point, which does not arise in the present case) that in using the expression "any Court" the Legislature had in its mind, cases of this description. The conclusion at which we arrive is that the suit was maintainable, and that this appeal must therefore be dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

ESHAN CHUNDRA SAFOOI (PLAINTIFF) *v.* NUNDAMONI DASSEE AND OTHERS (DEFENDANTS).

1884 *February* 5.

Withdrawal of Suit—Suit on behalf of a minor—Civil Procedure Code (Act VIII of 1859,) *s.* 97.—*Withdrawal of suit by next friend—Fraud.*

Where a Court has reason to believe that a suit is lawfully brought by a party who has a right to bring it on behalf of a minor, any withdrawal of the suit by that party would have precisely the same effect as the withdrawal of a suit by a person of full age.

But where a person acting for a minor has fraudulently withdrawn the minor's suit under s. 97 of Act VIII of 1859, without obtaining leave to bring a fresh suit, and by such withdrawal an absolute statutory prohibition is imposed on the minor from bringing a fresh suit, it is open to the minor

(1) *Sitaram* v. *Mahipal*, I. L. R. 3 All., 533.

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to relieve himself from the consequences of the fraud in one of three ways, *viz.*, (1) by an application to the Court in the suit in which the withdrawal took place; (2) by a regular suit to set aside the judgment founded upon the withdrawal; or (3) by bringing a fresh suit for the same purpose, and setting up the fraud as an answer to the statutory bar.

Appeal from a decision of NORRIS, J. dated 16th July 1883.

The suit was brought to have it declared that the plaintiff had been duly adopted, and for the construction of the will of one Mohesh Chundra Safooi.

The plaintiff stated that Mohesh Chundra Safooi died on the 5th June 1867, leaving him surviving his widow Matisoondari Dassee, and a daughter by her, Pullemoni Dassee, and two other daughters, Nundamoni and Bemola, by a wife who predeceased him; Bemola, one of the daughters abovementioned, having since married one Khetter Mohun Biswas. Mohesh Chundra made his will on the 27th May 1867, and appointed Nundamoni Dassee executrix thereof, and after giving certain specific legacies, he directed and empowered Matisoondari Dassee to adopt a son who should be chosen by Nundamoni Dassee, such adoption to be consented to by Nundamoni; and that after the death of Nundamoni Dassee, the said adopted son, or if no such adoption should be made, his son-in-law Khetter Mohun Biswas, should have and enjoy the residue of his property on certain trusts as in the will appeared. On the 27th June 1867, Nundamoni obtained probate of the will, and took possession of the property of the testator.

The plaintiff then alleged that he had, when at the age of five years in the year 1867, been duly adopted by Matisoondari with the consent of Nundamoni, and that subsequently to such adoption disputes regarding the property had arisen between Matisoondari and Nundamoni, and that the former in the year 1870, on her own behalf and as next friend of himself (the present plaintiff), had instituted a suit numbered 432 of 1870 against Nundamoni, in which she originally, amongst other things, had asked for a declaration that he (the present plaintiff) was the duly adopted son of Mohesh Chundra Safooi, but that the Court having refused to admit the plaint with such prayer

included therein, she abandoned the same, and prayed for construction of the will of the testator and for other relief.*

That suit came on for hearing on the 13th June 1871, and was then withdrawn by Matisoondari, no leave to bring a fresh suit being granted. NUND DASSI.

[In the Chief Clerk's Minute Book the note ran as follows: *S. M. M. Dassee* v. *S. M. N. Dassee.* Mr. *Lowe* and Mr. *Phillips* for plaintiff. Mr. *Marindin* and Mr. *Evans* for defendant. Mr. *Lowe* states plaintiff's case. Mr. *Lowe* gives up the case. *The Court.*—This is really a very discreditable suit. There is not a particle of foundation for saying the infant is the adopted son of the deceased. Mr. *Lowe* asks to withdraw the suit. Mr. *Marindin contra.* *The Court.*—Withdraw on payment of costs No. 2, including costs of commission. No leave granted to bring fresh suit].

The plaintiff further alleged that at the time the said suit was withdrawn, he was an infant, and he had been informed, and believed that the withdrawal of the suit had been brought about by the fraud and misconduct of a person named Nobin Chundra (deceased), who had managed the suit on behalf of Matisoondari, and that such withdrawal was not, therefore, binding upon him, and he, therefore, brought this suit having now attained full age, against Nundamoni, Khetter Mohun Biswas, and Matisoondari for the purposes abovementioned.

The defendant Nundamoni contended that the suit No. 432 of 1870 was a bar to this present suit, and denied that she had either chosen or consented to the plaintiff's adoption. The defendant Khetter Mohun contended that the plaintiff was not adopted according to the terms of the will of the testator. Mati-

*The prayer in suit No. 432 of 1870 ran as follows: That the will of the said testator may be construed, and that such of the trusts as are not contrary to law may be carried out; that the rights of all parties be ascertained and declared and given to them, and should any of the testator's property be found undisposed of, then that the present lawful heir of the said testator be declared entitled at once, and that the same be secured for the benefit of the persons entitled thereto; that accounts should be taken and a receiver appointed, and for an injunction restraining Nundamoni from preventing Matisoondari residing in the family dwelling house, and for further and other relief.

MONI SEE.

.ari stated that being a *purdahnashin*, she had been unable attend personally to the conduct of suit No. 432 of 1870, and that she had entrusted the management thereof to one Nobin Chundra Shaw, who, from fraudulent and corrupt motives, and without authority from her, or having spoken to her on the subject, and without her knowledge, obtained the withdrawal of the suit.

The correspondence set out in suit No. 432 of 1870 showed that Nundamoni had never given her consent to the adoption of the plaintiff.

Mr. *Phillips*, Mr. *Bonnerjee*, and Mr. *Trevelyan* for the plaintiff.

Mr. *Jackson*, and Mr. *Hill* for Nundamoni.

Mr. *J. G. Apcar* for Khetter Mohun.

Mr. *O'Kinealy* for Matisoondari.

Mr. *Jackson* submitted that the question of adoption was *res-judicata*, and put in the decree, plaint and written statement in suit No. 432 of 1870, and read the Registrar's minute of the 13th June 1871, and submitted the case should be dismissed with costs.

Mr. *Trevelyan* admitted the entry in the minute book, and the Court refused to hear evidence.

NORRIS J.—I must hold that this is *res-judicata*, and the suit must be dismissed with costs on scale No. 2.

The plaintiff appealed.

Mr. *Phillips* and Mr. *Bonnerjee* for the appellant.

Mr. *Phillips*.—The old suit was more comprehensive than the present one; the mother was a party, and had an interest herself, and at the same time was the next friend of the present plaintiff. It is not a question of *res-judicata*, it depends upon s. 97 of Act VIII of 1859.

I submit that that which is called *res-judicata* was a fraud; it was not, however, a question merely of fraud; there was no reason to withdraw the suit on that ground; the then plaintiff was asking for a relief which she was clearly entitled to; she asked for the construction of the will. We set up fraud in our plaint, but the Court refused to raise an issue on it, and dismissed the

party has precisely the same effect as the withdrawal of a suit by a person of full age. It is difficult to see why a suit properly brought on behalf of any other person, who cannot act for himself, should be subject (so far as the present question is concerned) to other rules, than those which are applicable to suits brought by parties in their own names.

Mr. Bonnerjee, by way of illustrating his argument, asks us to suppose the case of a person, who had nothing to do with a minor, and no right to sue on his behalf, bringing an action of trespass in the minor's behalf, and then, finding that the defendant had a good defence, withdrawing the suit on no better authority than he brought it. But that would be a totally different case from the present, simply because the person bringing the suit would not be the proper person to bring it.

If Mr. Bonnerjee could have shewn in this case that there had been any impropriety in the minor's mother bringing the former suit, and that the minor, for that or some other reason, was not bound by her acts or the acts of the person who managed the suit for her, that would have been a different thing. But here it is conceded, that the mother was the proper person to bring the former suit, and no objection was taken on that score, either in the former suit or in the Court below, or in this appeal.

We must, therefore, take it that the former suit was properly brought, and that being so, it seems to me that the withdrawal of the suit had the same effect as the withdrawal of a suit by an adult person.

That disposes of the first contention.

But there was another point raised by the appellant, which, if there had been any facts to support it, would have been perfectly good in point of law, namely, that the person who managed the suit on behalf of the plaintiff and his mother, withdrew it in fraud of the plaintiff, and in collusion with the defendant Nundamoni Dassee.

Of course, if there had been any ground for this contention, and if we were satisfied that it had been properly presented to the Court below, and the Court had refused to frame an issue

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to try it, I should consider that we ought to remand the case for the trial of such an issue.

But I am satisfied that this point, although it might have been mentioned, was not really pressed upon the attention of the Judge. I think if it had been refused, the Judge would have said something about it in his judgment, and some mention would have been made of it in the grounds of appeal. I am therefore not prepared to say that the learned Judge was wrong in not framing an issue upon that point.

At the same time, having regard to the plaintiff's position, if I were even now satisfied that the plaintiff had any real ground for contending that the withdrawal of the suit was brought about by fraud, I should certainly have been disposed to allow him, on proper terms, an opportunity of trying that issue in the Court below.

But I think, before we allow any party to raise an issue of fraud at this stage of the proceedings, we ought to be satisfied that there is some real ground for the contention; and it was for this reason that we required Mr. Phillips, when the Court rose yesterday, to produce an affidavit showing in detail what grounds his client had to support the contention.

An affidavit has accordingly been produced, made by the plaintiff himself, and I am satisfied from that affidavit that he has no sufficient ground to justify us in allowing such an issue to be raised.

The affidavit only states, that the mother's consent was neither asked nor granted for the withdrawal of the former suit, and that the person who was managing the suit received certain sums of money (not stating any amount) from the defendant Nundamoni Dassee, both before and after the withdrawal. But it does not appear that those sums were paid for any improper purpose.

The only suggestion of any fraud is made by the plaintiff himself in these words: "I allege that these payments were made as a consideration to the manager for withdrawing the suit." But he gives us no reason for supposing that the allegation is well founded. It is only made in this general form by the plaintiff, who at the time when the suit was withdrawn

was a child of some five or six years old, and could, of course, have known nothing of the matter.

We should do very wrong to allow an issue of fraud to be tried at this stage of the cause upon no better grounds than are disclosed in the affidavit.

There is only one other point upon which I think it right to say a few words.

We had some doubt during the argument whether, assuming that the withdrawal of the former suit to have been brought about by fraud, the plaintiff could bring the present suit without having taken some steps to set aside the former judgment; because this is not the case of *res-judicata* properly so called, but an absolute statutory prohibition imposed upon a party who has withdrawn a former suit without leave to bring a fresh one.

But it seems to me on consideration, that the rules which apply to cases of *res-judicata*, must apply generally to a statutory bar of this kind.

It was said in the *Duchess of Kingston's case*, quoting the opinion of Lord Coke, that "fraud vitiates the most solemn proceedings of Courts of Justice," and I think that, if in a case like the present it could be shewn that the withdrawal of the former suit was brought about by fraud and collusion between the party managing the suit and the defendants, the minor plaintiff might relieve himself from the consequences of the fraud in one of three ways: 1*st*, by an application to the Court in the suit in which the withdrawal took place; 2*ndly*, by a regular suit to set aside the judgment founded upon the withdrawal; or, 3*rdly*, by bringing a fresh suit for the same cause, and setting up the fraud as an answer to the statutory bar.

In this case, as there is no sufficient ground for raising the question of fraud, the appeal must be dismissed, and the appellant must pay the costs on scale No. 2.

CUNNINGHAM, J.—I concur on both points with what has just fallen from my lord.

The principal point urged in the appeal, namely, that s. 97 of Act VIII of 1859 did not contemplate the case of a minor represented by a next friend, is one which is of great importance as regards the position of minors who are brought into the case,

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and it is well that we have had the advantage of two learned arguments upon it; but I confess that the result of that argument is that, however reluctant we may be to accept a state of things which is calculated in some instances to work hardship to minors, I think that we must take it to have been the law, that, where a minor is represented in the manner sanctioned by the law, and the person so representing him adopts a procedure to which particular consequences attach by the Code, then those consequences must affect the minor. For this reason I think that s. 97 must be regarded as precluding the minor from re-opening the matter involved in a former suit from which the person acting for him has withdrawn. I also think that there are no grounds on which we can allow the issue of fraud to be raised at this stage of the proceedings.

Appeal dismissed.

Attorneys for appellant: Messrs. *Watkins & Co.*

Attorney for respondents Khetter Mohun and Nundomoni: Mr. *Hart.*

Attorney for respondent Matisoondari: Baboo *Ukhoy Chund Dutt.*

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice O'Kinealy.

1883 *December* 14.

DURGA SUNDARI DEVI, WIDOW OF MONOHANJAN DAS (AUCTION-PURCHASER) *v.* GOVINDA CHANDRA ADDY (DECREE-HOLDER) AND OTHERS (JUDGMENT-DEBTORS).*

Sale in Execution of decree—Application to set aside sale—Appeal from order rejecting application—Civil Procedure Code (Act XIV of 1882), s. 313—"Saleable interest."

There is no appeal to the High Court from an order refusing to set aside a sale, unless such order is made under ss. 294, 312, or 313 of the Civil Procedure Code.

A misrepresentation or concealment in the sale notification which induces a purchaser to buy a property for much more than it is really worth (although that misrepresentation or concealment may be fraudulent), is no ground for setting aside a sale under s. 313 of the Civil Procedure Code.

The meaning of s. 313, is, that when a purchaser under an execution sale buys a property, which turns out to have no existence at all, or to be

* Appeal from order No. 91 of 1883, against, the order of W. MacPherson, Esq., Additional Judge of 24-Pergunnahs, dated the 26th March 1882.